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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 465

ROSE KATZ,
Petitioner,

vs.

IRA G. KATZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

ROSE KATZ petitions for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Florida which denied a petition for certiorari directed to an opinion and judgment of the District Court of Appeal, Third District of Florida, which affirmed the judgment of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The opinion of the District Court and the Order and judgment of the Supreme Court of Florida are appended hereto. The Opinion of the District Court of Appeals is reported in 159 So.2d 241 (D.C.A. 3d, 1964). The order and judgment of the Supreme Court of

Florida is as yet unreported. Copies appear in the appendix.

The order and judgment of the Supreme Court of Florida is dated June 26, 1964.

Jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3).

The question presented for review is whether the Supreme Court of Florida and the District Court of Appeal, Third District, properly denied full faith and credit to a judgment of the Supreme Court of New York in a suit for divorce *a mensa* between the Wife-Petitioner and the Husband-Respondent in which the Court held that the husband had abandoned the Wife without just cause, where such judgment was properly asserted as a defense to the husband's suit for divorce *a vinculo* in the Circuit Court of Dade County, in which the acts of cruelty charged to have been committed by the wife were verbatim those that were asserted in the husband's counterclaim in the New York proceedings and which he withdrew prior to judgment.

Full faith and credit is required to be accorded to judgments of other states by U.S. Const., Art. IV, § 1, which provides as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The District Court of Appeal, Third District, held that under the decision of the Supreme Court of Florida in *Berman* v. *Berman*, 103 So.2d 611 (Fla. 1958), the Circuit Court of Dade County was correct in failing to sustain the

petitioner's affirmative defense of *res adjudicata* of the New York judgment. The Florida Supreme Court denied certiorari.

The petitioner-wife sued the respondent-husband in the Supreme Court of New York for a divorce *a mensa et thoro* charging him with abandonment without just cause or provocation (R. 25). The husband answered and counterclaimed for a divorce *a mensa et thoro* charging that the wife was guilty of extreme cruelty (R. 29). The allegations of that counterclaim filed in New York are almost verbatim those contained in the complaint subsequently filed by the husband in Florida seeking a divorce *a vinculo* upon grounds of extreme cruelty (R. 11).

The wife, in the New York proceeding, filed a reply to the counterclaim (R. 34). The parties then stipulated that the pleadings be amended (R. 40).

The cause was tried before the Court at which time the husband in the above Court withdrew his counterclaim (R. 44). Upon findings of fact and conclusions of law a judgment in favor of the wife was duly entered (R. 45), which recited that it was predicated upon "defendant's wilful abandonment of the plaintiff without cause." (R. 46).

On May 10, 1962, the husband sued the wife for divorce in the Circuit Court of Dade County, Florida. The allegations of the complaint are almost verbatim those in his New York counteraction (R. 11-17). A copy of the New York judgment was attached to the complaint (R. 18).

The wife answered the complaint and set up the New York judgment claiming that the respondent was barred from maintaining the suit because of the "principles of *res judicata*, and/or collateral estoppel and/or estoppel by judgment" (R. 20-21).

The wife filed a motion for partial decree on the pleadings (R. 48), which was denied (R. 49), and thereafter the Court confirmed its previous order by stating that the ruling had been based on *Berman* v. *Berman, supra* (R. 49).

The cause proceeded to a final decree in which the Court found that the equities were with the husband and that the wife had been guilty of extreme cruelty to plaintiff. The husband was awarded a divorce *a vinculo* (R. 50).

The wife appealed from said decree to the District Court of Appeal, Third District. She assigned as error the action of the Court in denying her claim of *res judicata* under the New York decree (See appendix). That Court affirmed the decree saying in part as follows:

> "At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, Fla. 1958, 103 So.2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra."

The wife thereafter applied to the Supreme Court of Florida for a writ of certiorari to review said opinion and judgment of the District Court of Appeal (R. 2). The petition stated that on the facts set forth the District Court of Appeal, Third District, was presented with the following question* (R. 5):

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*This is in conformity with the Rules of the Supreme Court, Florida Appellate Rules 4.5(6) and 7.2.

"(a) Whether the judgment of the Supreme Court of New York granting a separation a mensa to Rose Katz on the ground that the defendant wilfully and without cause abandoned her on December 24, 1955, was an adjudication that Rose Katz was not guilty of the several acts of cruelty alleged to have been committed by her prior to December 24, 1955, and was entitled to full faith and credit under Article IV, Section 1, U.S. Constitution."

The Supreme Court denied the petition on June 26, 1964, by Memorandum Decision (R. 81).

The reasons why the writ of certiorari should be granted are that the Circuit Court of Dade County, Florida, the District Court of Appeal, Third District, and the Supreme Court of Florida, have failed and refused to accord full faith and credit to the judgment of the Supreme Court of New York in *Rose Katz* v. *Ira G. Katz*, No. 30497/1955, as required by U.S. Const., Art. IV, Sec. 1.

In *50 C.J.S., Judgments*, § 888 b, p. 469, it is said:

"Under the full faith and credit clause of the federal Constitution and the federal statutes enacted thereunder, the judgment of a court of one state, when sued on, pleaded, or introduced in evidence in another state, is entitled to receive the same faith, credit, and respect that is accorded to it in the state where rendered, so that if a judgment is valid and conclusive in the state where rendered it is so in all other states, and a judgment is subject only to such pleas and defenses as would be permissible in the state where the judgment was rendered. * * *"

In *Harding* v. *Harding*, 198 U.S. 317, it was held that the issue of wilful desertion in a California divorce action was identical with the issue of abandonment, without fault, which had been presented in an Illinois separation action.

Accordingly, in order to arrive at the answer to the question here presented, which is whether full faith and credit should have been accorded the New York decree, it is necessary to ascertain what faith, credit and respect the decree *a mensa* in the prior Katz case would be accorded to it by the Courts of New York.

First: Would the Courts of New York have permitted Katz to assert in a subsequent suit against Mrs. Katz in that jurisdiction the matters previously set out in his counterclaim?

The leading New York case concerning the principle of *res adjudicata* is *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456. It was there held that:

> "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."

In *Lipscomb* v. *Lipscomb*, 179 Misc. 1025, 40 N.Y. Supp. 2d 720, the husband sued to set aside a separation agreement by reason of fraudulent representations allegedly made by the wife which were relied upon by him at the time the agreement was executed.

Subsequent to the execution of the separation agreement the wife had instituted divorce proceedings in Nevada. The husband pleaded and offered in evidence the separation agreement and asked the Court to approve and ratify it. The husband did not question the provision in the agreement as to the amount and period of payment. Thereafter, the Nevada Court granted the wife a decree of divorce in which the separation agreement was ratified

and confirmed. The Court held that the rule of *res adjudicata* applied and that the husband might not raise the question of the validity of the separation agreement since its validity was directly at issue in the Nevada action. The Court further stated that the circumstances as to the separation agreement were known to the husband at the time of the Nevada action, and, if he believed the agreement to be illegal, he *could* have pleaded such a defense in the Nevada action. Not having done so, but having slept on his rights in that respect at that time, that issue may not be raised in the New York action because in applying the doctrine of *res adjudicata*, it is not necessary that the particular question that is now at issue had been raised and passed upon directly in the former action.

> "It is sufficient if the question at issue *could have been* so raised and litigated in the former adjudication."

Schoelles v. *Uhlendorf*, 34 Misc. 2d 738, 228 N.Y. Supp. 2d 1003, appears to be precisely in point.

In this action plaintiff sought to impress a trust on the assets received by the defendant as the principal beneficiary under a will which had been admitted to probate. The action was based upon fraud and undue influence practiced on the deceased testator. In the probate proceeding, to which the plaintiff was a party, the Surrogate admitted the will to probate. The plaintiff had urged, as a contestant in the probate proceedings, the same grounds in objection to the probate of the will as she was alleging in the present action. On the probate trial, plaintiff's counsel stated that she was not ready to proceed. The Surrogate, however, directed the trial to proceed and denied her attorney's application to withdraw. The Surrogate found that the will had been executed in accordance with the provision of Sec. 21 of the Decedent's Estate Law and that the testator was of sound mind and free of any restraint at

the time she executed the will. Plaintiff, thereafter, unsuccessfully moved to open her default.

The Court, in this action to impress a trust, held that the decree of the Surrogate was a bar to the action and stated that the fact that plaintiff failed to avail herself of the opportunity to offer proof did not destroy the estoppel created by the judgment. In support thereof the court cited the *Schuylkill* case and underscored the phrase which is contained in the above quote, "any that might have been so litigated."

The foregoing cases therefore establish the rule that an unsuccessful defendant cannot plead as a cause of action facts that he could have pleaded as a defense in the prior action. It, therefore, appears clear that since New York would not permit Mr. Katz to assert his present claim, Florida likewise may not permit him to do so.

Secondly: In New York justification for leaving is a sufficient defense in a suit for divorce *a mensa* on the grounds of abandonment.

In *Williams* v. *Williams*, 130 N.Y. 193 (1891), 29 N.E. 98, the wife sued the husband for separation on the ground of abandonment. He asserted as a defense that she had abandoned him. The facts were that the husband had forbidden the wife from seeing her mother. At first she refused to live with him for that reason, but later offered to return unconditionally, which offer he rejected. In deciding the case in the wife's favor, the court found that the husband had coerced the wife into leaving so that her leaving was involuntary and was justified. In its decision, the court said:

> "* * * Under these circumstances, it is clear that the defendant (husband) never had a cause of action in this state against the plaintiff for desertion (abandon-

ment). That term, as used in the law of divorce, contemplates a voluntary separation of one party from the other *without justification* with the intent of not returning." (130 N.Y. at 197). (Emphasis supplied).

The above language is quoted in *People ex rel. Commissioners* v. *Cullen*, 153 N.Y. 629 (1897), 47 N.E. 894 (no abandonment because husband was living apart from wife under a separation decree); *Heyman* v. *Heyman*, 119 App. Div. 182 (1st Dept. 1907), 104 N.Y. Supp. 227 (no abandonment because no voluntary leaving, and intent to return shown); *Deisler* v. *Deisler*, 59 App. Div. 207 (2d Dept. 1901), 13 N.Y. Supp. 398 (relief denied wife in her separation action on ground that husband's leaving was justified by wife's immoral conduct with another man); and in *Simon* v. *Simon*, 6 App. Div. 469 (1st Dept. 1896), 39 N.Y. Supp. 573, aff'd 159 N.Y. 549 (1899), 54 N.E. 1094 (husband sued for separation on ground of abandonment, wife counterclaimed for separation on same ground; separation denied to both parties on ground that negotiations regarding reconciliation were in progress and neither party had proved abandonment).

The *Williams* language was again cited recently in *Diemer* v. *Diemer*, 8 N.Y. 2d 206, 213 (1960); 203 N.Y. Supp. 2d 829. The issues in that case were (a) whether husband (plaintiff) had been justified in leaving home, and suing for separation by the fact that wife had refused to have sexual intercourse with him until he underwent a particular religious ceremony, and (b) whether the fact that husband had pleaded cruelty, but had proven abandonment disentitled him to relief (the dissent was based entirely on this latter point; the majority opinion states that husband had shown himself entitled to separation on at least one ground, that being all that was necessary).

Speaking for the majority, Judge Fuld ruled that husband had clearly made out a case of abandonment and was entitled to a separation "unless his wife had good legal cause to refuse to have sexual intercourse with him. And, as to that, it is equally clear that she had neither cause nor justification." (8 N.Y. 2d at 211). The opinion discusses husband's refusal to undergo the religious ceremony as a justification for wife's constructive abandonment, and found that it was insufficient justification.

The *Diemer* case clearly implies that justification for leaving is a sufficient defense in an abandonment, as stated in the language quoted from the *Williams* opinion, *supra*.

Third: Treatment which is neither sufficiently cruel nor inhuman to provide a defense by way of separation to an action *a mensa* is insufficient as a ground for a separation action and hence for divorce *a vinculo*.

The next point in the present line of argument is that the quantum of cruel and inhuman treatment which amounts to justification for leaving one's spouse, *i.e.*, which is sufficient as a *defense* in a separation action, is less than the quantum required to make out an *affirmative* case for separation. Alternatively stated, treatment which is neither cruel nor inhuman enough to provide a defense, by way of justification, to a separation action brought by the other spouse, is *a fortiori* insufficient as a ground for one's own separation action.

This point was specifically established by the Appellate Division in *Russ* v. *Russ*, 3 App. Div. 2d 883 (4th Dept. 1957), 161 N.Y. Supp. 2d 696, aff'd 4 N.Y. 2d 743 (1948), 148 N.E.2d 911. In that case husband and wife had sued each other for separation, husband alleging wife's abandonment, and wife alleging husband's cruel and inhuman treatment of her. The Appellate Court found that wife had not

shown sufficient cruelty and inhumanity on husband's part to merit a decree of separation in her favor. But she had shown *sufficient* justification to constitute a *defense* to husband's action, and the parties were left where they had been found. The language is instructive:

> "* * * We are satisfied that the cruel and inhuman treatment of appellant (W) by respondent (H) was not established. It does not follow, however, that the latter (H) is entitled to a separation on the ground of unjustifiable abandonment. 'Cruel and inhuman treatment is not the only "justification" which may be pleaded in defense to an action for separation predicated upon allegations of abandonment.' (Citation omitted). We believe that the relations which existed between the parties for a substantial period of time, and respondent's attitude toward his wife, were such that she was justified in leaving him and establishing her own home. In other words, we find that the defendant sustained her defense of justification within the provisions of Section 1163 of the Civil Practice Act. However, in our opinion *the quantum of proof was such that it did not rise to the necessary level to justify the granting of a judgment of separation based upon cruel and inhuman treatment* as set forth in defendant's counterclaim and in our opinion this phase of the case was correctly decided. .. ." (3 App. Div. 2d at 889) (Emphasis supplied).

The *Russ* opinion establishes the rule that a higher level of proof is required to make out a cause of action for separation than to make out a justification defense to the other spouse's action. Conversely, if a spouse has not shown sufficient cruelty, etc., to make out a justification defense, he certainly has not shown cruelty sufficient to warrant relief in his own separation action, since the latter required a higher level of proof than does the former. This brings us to the third and final step of the present line of argument. If "abandonment" means an unjustified

leaving, and if the degree of proof necessary to show justification is less than that required to make out a case for affirmative relief, then the New York Court which granted Mrs. Katz a separation on the specific ground of abandonment necessarily determined that Mr. Katz had no justification for leaving her, and *a fortiori* that he had no cause of action for separation; and that determination would be binding, by way of collateral estoppel, in a later New York separation action brought by Mr. Katz.

In *Statter* v. *Statter*, 2 N.Y. 2d 668 (1957), 143 N.E.2d 10, the husband sued the wife for separation on the grounds of cruelty and abandonment. The wife admitted validity of the marriage, but denied the allegations as to cruelty and abandonment. Judgment was entered in the husband's favor on the ground of abandonment. The Court found, among other things, that the parties were lawfully married.

Over two years later the wife commenced an action for annulment on the grounds that the husband had been lawfully married at the time of his marriage to the present wife and that her consent to the marriage had been procured by fraud. The husband moved to dismiss the complaint on the ground that the judgment in the earlier action was determinative of the issue of the marriage's validity. A denial of this motion by two lower courts were reversed on appeal.

The Court of Appeals cited *Pray* v. *Hegeman* (98 N.Y. 351, 358) and *Ripley* v. *Storer* (309 N.Y. 506, 517), 132 N.E.2d 87, as authority for the proposition that: "Whatever is necessarily implied in the former decision, is for the purpose of estoppel deemed to have been actually decided." (2 N.Y. 2d 672). It then stated that: "It is clear beyond dispute that . . . the existence of a valid marriage (is) a condition precedent to the successful

maintenance of a cause of separation . . . and that a judgment of a separation establishes the existence of a valid and subsisting marriage between the parties. . . ." (*Ibid.*) In other words, the *Statter* case says that anything necessarily determined in one action is *res judicata* in a later action where the same point is in issue. To rule otherwise would "destroy or impair rights or interests established by the first (judgment)." *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456.

A recapitulation of the line of argument in the present situation, in the light of the foregoing cases, runs as follows: When Mrs. Katz was granted a separation on the ground of abandonment, the Court necessarily determined that Mr. Katz had left her, without justification; he *a fortiori* had no cause of action for separation (the maximum possible remedy for cruel and inhuman treatment in New York) because the earlier judgment is *res judicata* on the question of lack of justification. To grant a divorce now on the same grounds would be equivalent to determining that he had had more than sufficient justification for his leaving, which would amount to a collateral attack on the basis of the first judgment.

Since such recognition would be accorded the decree of separation by the New York courts on motion, it is obvious that under the Full Faith and Credit Clause Florida courts are bound to accord the same recognition to the decree when its validity or limitations are brought in evidence in the courts of this state.

Our position is further supported by the following authorities:

In *Cameron* v. *Cameron*, 68 S.E.2d 796 (N.C. 1952), 31 A.L.R. 2d 436, the question presented for decision was whether the pendency of a prior action by the wife for

a divorce from bed and board upon the ground of abandonment would abate a subsequent action by the husband for an absolute divorce on the ground of a two year separation. In the course of its opinion, the Court said:

> "Where the wife sues the husband for a divorce from the bed and board upon the ground of abandonment under GS § 50-7, subd 1, she must prove as an essential part of her case that her husband has wilfully abandoned her. Brooks v. Brooks, 226 NC 280, 37 SE 2d 909. Where the husband sues the wife for an absolute divorce upon the ground of two years' separation under GS § 50-6, he is not required to establish as a constitutent element of his cause of action that he is the injured party. Taylor v. Taylor, 225 NC 80, 33 SE 2d 492. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under GS § 50-6 by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. Taylor v. Taylor, supra; Pharr v. Pharr, 223 NC 115, 25 SE 2d 471; Byers v. Byers, 223 NC 85, 25 SE 2d 466; Reynolds v. Reynolds, 208 NC 428, 181 SE 338. It follows that a judgment on the merits in favor of Mrs. Cameron in the prior action in Sampson County will operate as a bar to Cameron's prosecution of the subsequent action in New Hanover County. Such judgment will necessarily adjudicate that Cameron has wilfully abandoned Mrs. Cameron."

In *Gloth* v. *Gloth*, 153 S.E. 879 (Va. 1930), 71 A.L.R. 700-710, the Court said:

> "* * * If the desertion of the husband is a bar to a suit for divorce a vinculo brought by the husband on the ground of the adultery of the wife committed after the institution of and during the pendency of a suit for divorce a mensa et thoro brought by the wife on the ground of such desertion (which were the facts

in Kirn v. Kirn, supra), then, on principle, it must follow that a decree judicially establishing the desertion and granting to the wife a divorce a mensa et thoro on the grounds of desertion is a bar to a suit for divorce a vinculo brought by the husband for adultery committed after the entry of the decree a mensa et thoro."

In *Kirby* v. *Kirby*, 55 P.2d 356 (Kan., 1936), the Court said:

"It is true that our statutes do not in terms provide for a decree a mensa et thoro, although in many respects similar relief may be granted under R.S. 60-1506. The fact the decree is for a limited instead of an absolute divorce does not, however, mean the decree is not entitled to full faith and credit to the extent to which it grants relief. In Freeman on Judgments (5th Ed.) Vol. 3, p. 2972, § 1442, it is stated: 'A limited divorce a mensa is as much entitled to full faith and credit under the constitution or principles of international comity as an absolute one. A wife's decree of separate maintenance in another state is conclusive as to every matter adjudicated by it, in harmony with the general rules as to what is adjudicated by such a decree and its effect in a subsequent suit for divorce. If it adjudicates that she was not guilty of cruelty, or that he was guilty of cruelty, it is res judicata on this issue. So if the decree was on the ground of abandonment by the husband, it is conclusive of this fact. If he consented to a decree on a stipulation that she was living separate from him for legal cause, this is conclusive against him in his subsequent suit for divorce in another state. A decree of divorce a mensa in favor of the husband is likewise entitled to the same effect elsewhere as it has where rendered. A decree denying relief in a suit for divorce a mensa is conclusive in a subsequent divorce suit of all the issues adjudicated. Thus a finding against a claim of cruelty is res judicata in the husband's suit for desertion."

See also *Montell* v. *Montell*, 46 So.2d 715 (Fla. 1950), and *Carducci* v. *Carducci*, 92 So.2d 360 (Fla. 1955).

The lower court disposed of these contentions by stating that the question was foreclosed by *Berman* v. *Berman*, 103 So.2d 611 (Fla. 1958).

The *Berman* case did indeed involve the effect of a New York divorce *a mensa* in a subsequent Florida divorce action. In denying effect to the New York judgment, the Supreme Court stated that at the conclusion of the wife's testimony her attorney advised the Court that he did not wish to put on further evidence because he had been informed by his adversary "that the defendant does not intend to contest the action for separation, and we have agreed that the plaintiff will accept and the defendant will pay in a final decree $125.00 a week towards the maintenance of the plaintiff. That is all." The Supreme Court then added that the trial judge said:

> "Judgment is directed in favor of the plaintiff for separation on the ground of abandonment. Alimony is fixed in the sum of $125.00 a week * * *."

Then the Court added this significant statement:

> "In these circumstances it cannot be said that the 'points and questions' presented in the instant suit for divorce were 'actually litigated and decided' in the New York proceeding."

As we have pointed out above the decision of the Supreme Court of New York in the Katz separation suit recited that the cause came on to be heard, that counsel for both parties were present, that the proofs and allegations of the plaintiff had been heard and that the defendant had presented no proof in support of the allegations contained in his answer to the amended complaint. It is true that

the defendant in open court withdrew the counterclaim contained in his answer, but it is not a fact that he consented to the entry of the decree except that he did stipulate that the plaintiff should be paid the sum of $346.15 per week. There was no stipulation that the defendant had wilfully and without cause abandoned the plaintiff on December 24, 1955. These findings were confirmed in the judgment of separation. However, had Katz so admitted he would have no case now.

We reiterate that the decree of the Supreme Court of New York was binding upon the parties, that it adjudicated the guilt of Mr. Katz in abandoning his wife and that it is therefore entitled to full faith and credit under the Federal Constitution. However, if it were a fact that the appellee had consented to the entry of the judgment itself as distinguished from the agreeing to the amount of the alimony, it would still not have disentitled the appellant to rely upon the judgment under the full faith and credit clause.

In *49 C.J.S., Judgments*, Par. 403, page 800, it is said:

> "The rule against collateral attack applies to judgments entered on confession, either in open court or under warrants of attorney, and also to such as are rendered by consent of parties, as the result of a compromise or settlement."

And see *Einstein* v. *Davidson*, 17 So. 563 (Fla. 1895).

In *50 C.J.S., supra*, Par. 705, page 160, it is said that:

> "A judgment entered on the confession of defendant is conclusive evidence of the existence, validity, and amount of the debt, and of the rights of the parties as far as they are necessarily implied in the rendition of such a judgment, and its conclusiveness is not affected by the fact that there was a mistake as to the

amount, due to defendant's false and fraudulent representations. So, also, a judgment rendered on the consent, stipulation, or agreement of the parties is binding and conclusive on them and their privies, successors, or persons claiming under them, in the absence of fraud, collusion, want of power to consent, or want of jurisdiction in the court rendering the judgment. Such a judgment is regarded as conclusive and effective as an estoppel to the same extent as one rendered after a full trial."

Cited to the text is *Hay* v. *Salisbury*, 109 So. 617, 621 (Fla. 1926), wherein the Florida Supreme Court said:

"While the decree relied upon as having adjudicated the rights claimed by the appellant in the instant suit was by default or upon decree pro confesso, yet it does not prevent the decree being conclusive and binding between the parties as to the matters litigated. 15 R.C.L. p. 987, par. 461; United States ex rel. George W. Harshman v. County Court of Knox County, 122 U.S. 306, 7 S.Ct. 1171, 30 L. Ed. 1152.

'The conclusiveness of a judgment upon the rights of parties does in no wise depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is, in its nature, just as conclusive upon the rights of the parties before the court, as a judgment upon demurrer or verdict.' Gifford v. Thorn, 9 N.J. Eq. 722."

We said, in *Huddleston* v. *Graham*, 73 Fla. 350, 74 So. 414:

" 'Where in an equity cause the legal and equitable title to land is adjudicated as between the parties, the decree in said cause will constitute res adjudicata as between the same parties or their privies in a subsequent action at law involving the title to said land.' "

We submit that the New York decree established that Mrs. Katz had given Katz no cause to abandon the matrimonial domicile and that this adjudication as to being without fault is conclusive in our courts under U.S. Const., Art. IV § 1. The lower court erred in denying full faith and credit to the New York decree.

CONCLUSION

The petition should be granted and the judgment of the Supreme Court of Florida should be quashed with directions to set aside the judgment of the District Court of Appeals, affirming the Circuit Court of Dade County, and to direct the Circuit Court to dismiss the complaint brought by the respondent against the petitioner on the ground that the matters and things set forth in the complaint were adjudicated by the New York decree.

Respectfully submitted,

.....

THOMAS H. ANDERSON

ANDERSON & NADEAU,
Attorneys for Petitioner,
1126 First National Bank Building,
Miami 32, Florida.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963

ROSE KATZ, Appellant,
vs.
IRA G. KATZ, Appellee.
Case No. 63-292

IRA G. KATZ, Appellant,
vs.
ROSE KATZ, Appellee.
Case No. 63-326

Opinion filed January 10, 1964.

Appeals from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Anderson & Nadeau; Fowler, White, Gillen, Humkey & Trenam and Harold L. Ward, for Rose Katz.

Milton M. Ferrell; Paul A. Louis and Bertha Claire Lee, for Ira G. Katz.

Before BARKDULL, C.J., and HORTON and TILLMAN PEARSON, JJ.

BARKDULL, Chief Judge.

This appeal involves the correctness of a final decree of divorce. The wife has taken an appeal from the decree and urges that the chancellor erred in granting her husband

a divorce, both in the finding of residence and grounds for divorce; that he awarded inadequate alimony and in failing to sustain her defenses of laches and res adjudicata. The husband has appealed and contends that the chancellor erred in the awarding of alimony and attorney's fees. The appeals were consolidated for determination.

From a review of the record in this case, it is apparent that the chancellor spent considerable time and effort in determining this cause and in reviewing the testimony and evidence presented to him, much of which was in direct conflict. The final decree arrived in this court with a presumption of correctness. See: Picchi v. Picchi, Fla.1958, 100 So.2d 627; Bennett v. Bennett, Fla.App.1962, 146 So.2d 588. It was incumbent upon the parties urging error to demonstrate same. See: Vaughn v. Stewart, 140 Fla. 88, 191 So. 693; Lynch v. Coppola, Fla.App.1961, 129 So.2d 183. No error is found in the chancellor's finding that the husband was a resident of Florida and granting him a final decree of divorce and in rejecting the defenses of condonation and laches. The evidence was in direct conflict as to the reasonableness of attorney's fees and there was substantial, competent evidence before the chancellor to support the award which he rendered, and same will not be destroyed in the face of such evidence. See: Lewis v. Lewis, Fla.App.1958, 104 So.2d 597; Ginsberg v. Ginsberg, Fla.App.1961, 127 So.2d 137. The chancellor had the power to award lump sum alimony in his discretion. See: Rubinow v. Rubinow, Fla.1949, 40 So.2d 561; Cocalis v. Cocalis, Fla.App.1958, 103 So.2d 230; § 65.08, Fla.Stat. The fact that he made the lump sum payable over a period of time is not error. See: Schuberth v. Schuberth, Fla.1951, 52 So.2d 332; Pross v. Pross, Fla.1954, 72 So.2d 671; 10 Fla.Jur., Divorce, § 164. Neither was it error to require the husband to secure the lump sum

award to the wife. See: § 65.08, Fla.Stat., 10 Fla.Jur., Divorce, § 235.

At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, Fla.1958, 103 So.2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra.

In this cause, the wife filed a complaint for separation; the husband answered and filed a counterclaim seeking a separation, urging extreme cruelty. Thereafter, it can be reasonably inferred from the record [because of activities of counsel for the wife] that the husband sought a settlement of their domestic litigation, which was accomplished, and the wife filed an amended complaint. The husband withdrew his original counterclaim, filed an answer to the amended complaint, and the New York judge entered a decree of separate maintenance providing for weekly payments to the wife totalling $18,000.00 a year, which payments the wife accepted at all times. This decree was entered upon proofs.

The only apparent difference between the Berman v. Berman case, supra, and the instant case is that one was submitted on affidavits and the other on proofs. In the Berman v. Berman case, supra, the Supreme Court held that the actions in New York were not res adjudicata as to the action in Florida by the husband. In the instant case, it appears that the decision in Berman v. Berman, supra,

should control and that the husband's action for divorce in Florida should not be barred by the previous New York litigation. As to the defense of condonation, this is a question of fact. See: North v. Ringling, 149 Fla. 739, 7 So.2d 476; Seiferth v. Seiferth, Fla.App.1961, 132 So.2d 471. There was conflicting evidence on this issue; the chancellor resolved these conflicts in favor of the husband. This determination is adequately supported in the record. Therefore, both parties having failed to make error appear in the chancellor's final decree, same is hereby affirmed.

Affirmed.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1964

FRIDAY, JUNE 26, A.D. 1964

ROSE KATZ, Petitioner,

vs.

IRA G. KATZ, Respondent.

Case No. 33,340

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date January 10, 1964 and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

(SEAL)

A True Copy

TEST:

/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court.

ASSIGNMENTS OF ERROR

The defendant, ROSE KATZ, hereby specifies as the errors upon which she will rely in the District Court of Appeal, Third District, for reversal of the Final Decree of Divorce entered herein on January 31, 1963, recorded in Chancery Order Book 1654, Page 328, the following severally:

1. The Court erred in making and entering the Order dated and filed July 12, 1962, recorded July 13, 1962, in Chancery Order Book 1611, Page 63, which Order denied the defendant's Motion to Dismiss.

2. The Court erred in making and entering the Order Denying defendant's Motion to Dismiss dated October 5, 1962, filed October 8, 1962, as it affirmatively appears that the plaintiff was not a bona fide resident of the State of Florida.

3. The Court erred in making and entering the Order dated October 8, 1962, filed October 8, 1962, denying the defendant's Motion for Partial Decree upon the Pleadings, as it affirmatively appears that the plaintiff's claimed cause of action was res adjudicata by reason of the prior proceedings had between the same parties in the courts in the State of New York, wherein the wife instituted an action for divorce a mensa et thoro, which culminated in a Final Decree of Separation in favor of the wife.

4. The Court erred in making and entering the Order dated October 8, 1962, filed October 8, 1962, denying the defendant's Motion for Partial Decree upon the Pleadings, as it affirmatively appears that the plaintiff was estopped by the proceedings had in the courts of the State of New York, which resulted in a Decree of Separation in favor of the wife who was then the plaintiff, as said Decree of

Separation, or limited divorce, operated as an estoppel by judgment to bar the husband from maintaining the within action for divorce.

5. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963.

6. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the plaintiff's claimed cause of action was res adjudicata by reason of the prior proceedings had between the same parties in the courts of the State of New York, wherein the wife instituted an action for a divorce a mensa et thoro, which culminated in a Decree of Separation in favor of the wife.

7. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the plaintiff's claimed cause of action was litigated in prior proceedings had between the same parties in the courts of the State of New York, wherein the wife was plaintiff in an action for divorce a mensa et thoro, which action culminated in a Final Decree of Separation in favor of the wife. That decree operated as an estoppel by judgment, and the Court erred in not so finding and adjudicating.

8. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as it affirmatively appears that the grounds for divorce herein asserted by the plaintiff, and upon which the Court necessarily predicated its decree, were no longer existent, but had been merged in the prior Separation Decree entered by the courts of the State of New York in favor of the wife. The reconciliation between the parties, subsequent to the entry of the New York decree, operated as a condonation

of the acts now asserted by the plaintiff as a basis for his action.

9. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as the Court erred in finding that the equities were with the plaintiff and against the defendant and therein adjudging that the defendant was guilty of extreme cruelty against the plaintiff, the said findings being contrary to the preponderance of the evidence.

10. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, as the award to the wife of $166,500.00 payable either in a lump sum or by installments, provided for in the Final Decree, was insufficient as a matter of law in light of the wealth of the plaintiff and the equities in favor of the wife as demonstrated by the record.

11. The Court erred in making and entering the Final Decree of Divorce dated and filed January 31, 1963, and therein adjudicating that the defendant was to be awarded the total sum of $166,500.00, payable in installments, as an appropriate award of a lump sum payment, and then providing for payment thereof in installments, is contradictory and not authorized as a matter of law.

12. The Court erred in making and entering the Order dated March 5, 1963, filed March 5, 1963, recorded in Chancery Order Book 1662, Page 583, to the extent that said Order denied the defendant's Petition for Rehearing.

ANDERSON & NADEAU
By THOMAS H. ANDERSON
Attorneys for Defendant
1126 First National Bank Bldg.
Miami 32, Florida

I HEREBY CERTIFY that a copy of the foregoing Directions to the Clerk and Assignments of Error was mailed to Milton M. Ferrell, 550 Brickell Avenue, Miami 32, Florida, and to Paul A. Louis and Bertha Claire Lee, dupont Building, Miami 32, Florida, Attorneys for Plaintiff, this 26th day of April, 1963.

THOMAS H. ANDERSON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 465

ROSE KATZ,

Petitioner,

v.

IRA G. KATZ,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

BRIEF FOR RESPONDENT IN OPPOSITION

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Does a New York separation decree granted to the wife on the ground of abandonment (where husband withdrew his counterclaim and consented to the alimony award) bar a Florida Court from granting the husband a divorce on the ground of extreme cruelty where the wife not only personally appeared to defend but also sought and obtained affirmative relief, and the husband proved acts of cruelty subsequent to the New York separation decree?	
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IN THE

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---

BRIEF FOR RESPONDENT IN OPPOSITION

The following abbreviations will be used:

R — Record
PC — Petition for Certiorari
PA - Petitioner's Appendix
RA — Respondent's Appendix

QUESTION PRESENTED

Does a New York separation decree granted to the wife on the ground of abandonment (where husband withdrew his counterclaim and consented to the alimony award) bar a Florida court from granting the husband a divorce on the ground of extreme cruelty where the wife not only personally appeared to defend but also sought and obtained affirmative relief, and the husband proved acts of cruelty subsequent to the New York separation decree?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision set out in Petition for Certiorari, the instant case also involves New York Statutes, Section 1161, and Florida Statutes, Section 65.04.

Florida Statutes, § 65.04:

> Grounds for divorce. — No divorce shall be granted unless one of the following facts shall appear:
>
> * * * *
>
> (4) Extreme cruelty by defendant to complainant.

Civil Practice Act New York. § 1161 (1955, Now Domestic Relations Law § 200):

> § 1161. **Action for separation; when maintainable.** An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:
>
> 1. The cruel and inhuman treatment of the plaintiff by the defendant.
>
> 2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former.
>
> 3. The abandonment of the plaintiff by the defendant.
>
> 4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.
>
> 5. . . . .

STATEMENT OF THE CASE

Rose Katz personally appeared in Florida to defend against her husband's complaint for divorce. Her two-count counterclaim (R 12-14) sought to increase her New York consent alimony award from $18,000 per annum ($346.15 per week) to $60,000 per year (R 13), and in addition, all attorneys, fees, suit money, court costs, etc. (R 14). Ira Katz was awarded a Final decree of divorce **a vinculo** on the ground of cruelty (R 40). Rose Katz was awarded $166,500 lump sum alimony payable over a twelve-year

period, said sum to become a charge against the estate of the 74-year-old respondent (R 41). Further, the decree required that the lump sum award be secured (R 41). Mrs. Katz was also awarded in excess of $18,000 for attorneys' fees and court costs. Accepting the aforementioned benefits without prejudice, Mrs. Katz appealed to the District Court of Appeal of Florida, Third District, urging as one of her grounds (now abandoned) that the Chancellor's alimony award was inadequate.[1]

Background of the Controversy

Ira Katz, now 74 years old (R 6), married Rose Katz, now 55, in July of 1945 (R 2). Both parties had previously been married (R 1). Mrs. Katz was a divorcee without children (R 1). Mr. Katz was a widower with five children, three of whom had not attained their majority (R 2).

For purposes of this reply, respondent will summarize only that evidence which proved petitioner's acts of cruelty occurring **subsequent** to the New York separation decree of 30 April 1956. Respondent will not summarize the evidence adduced before the Chancellor which proved the wife's acts of cruelty prior to the entry of said New York separation decree. Those prior acts had been the subject of respondent-husband's New York counterclaim which had been withdrawn at the time he stipulated to the entry of the $18,000 alimony award. It is undisputed that the parties never lived together after 24 December 1955 (R 34).

Without contradiction, Sarah and Ben Kessner, key employees of Ira G. Katz, Inc., respondent's business en-

[1]Katz v. Katz, (Fla. App. 3rd 1964) 159 So. 2d 641.

terprise, testified that after the final separation of the parties, Rose Katz continued to call them at their home and at the factory and discuss her domestic problems (R 72-74, RA 3-9). She denied obscenities.

Ben Kessner testified that as late as August 1958, Mrs. Katz telephoned and advised him that he should make sure that he would be taken care of as far as the business was concerned "because Mr. Katz was not trustworthy and the children were not!" (R 77; RA 8). She called him (Ira Katz) a f-----g bastard; she said all of his children were bastards, and so forth. She said, "You should take care of yourself insofar as your future in the business is concerned." (R 75-76). Sarah Kessner testified of similar conversations with Rose Katz which had occurred after the parties finally separated in December of 1955, wherein Rose Katz had warned her to "watch and see that he didn't screw you like he did her." (R 73; RA 5)

Rose Katz testified that she called Sarah Kessner as late as 24 August 1962 (R 70; RA 2). Rose Katz testified that in December of 1962, during the proceeding **sub judice** by ruse she entered and searched a New York apartment then under lease to Mr. Katz (R 71), pursuant to a three-year lease, which lease commenced in 1960, and which Ira Katz had unsuccessfully attempted to sublease. Mrs. Katz also testified that there was no chance for the marriage, and that she didn't want respondent back (R 69, RA 1).

REASONS FOR DENYING THE WRIT

1. **Petitioner's acts of cruelty which occurred subsequent to the New York separation decree make moot her contention of res judicata.** In framing her question presented for review (PC 2), petitioner begs the issues. Petitioner ignores that the record contains competent substantial evidence of her acts of cruelty subsequent to the New York decree of separation of 30 April 1956 continuing almost up until the day of the final decree of divorce (R 70; RA 3-9).

In Paragraph 10 of his Florida Complaint filed May, 1962, Ira Katz alleged (R 4):

> "That on different occasions during the past years of their marriage, and more particularly in 1953 and 1954, Defendant had made frequent daily telephone calls to Plaintiff's place of business, and had engaged him in conversations, upbraiding him and castigating him, and also on some of such occasions, spoke to employees of Plaintiff, and in such conversations called Plaintiff and his children, some of whom are in business with Plaintiff, vile and obscene names."

Without objection, Sarah and Ben Kessner, key employees of Ira G. Katz, Inc., testified that after the final separation of the parties in December 1955, Rose Katz continued to call them at their home and at the factory and discussed her marital problems and warned them, as late as 1958, to be wary of Ira Katz (R 72-76; RA 3-9). Rose Katz herself testified of her bold entry into the New York apartment of Ira Katz in December of 1962

(R 70). The record abounds with competent substantial evidence of misconduct by Rose Katz towards Ira Katz subsequent to the separation decree of 30 April 1956.

In **Coleman v. Coleman,**[2] the Florida Supreme Court took notice that plaintiff's husband was a pharmacist by profession, and that his wife, "went to the store where plaintiff was employed and engaged in heated arguments with him . . . When plaintiff objected to her activities, she resorted to profanity and called him insulting names in the presence of others."

In reversing the Chancellor, and ordering that a divorce be granted to the husband, the Florida Supreme Court stated:

> "The bonds of matrimony were never designed to wreck the health or to become burdensome or materially destroy the business of those assuming them, but on the other hand they are intended to promote or advance the mutual best interest and general welfare of all those entering the portals of that ancient institution."

In **Berman v. Berman,**[3] in affirming a divorce to the husband on extreme cruelty, the Court took note that the wife never failed to call the clients of her husband and make disparaging remarks about her, to his great embarrassment.

In **Macaluso v. Macaluso,**[4] a New York court had

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[2](Fla. 1946) 26 So. 2d 445.

[3](Fla. S. Ct. 1958) 103 So. 2d 611. For convenience, the Berman opinion is set forth in full in the Appendix hereto at RA 9-18.

[4](1960) 207 N.Y.S. 2d 105.

occasion to determine the weight to be given a Florida divorce decree to the husband predicated upon service by publication in light of a prior New York separate maintenance decree in favor of the wife. The New York court stated:

> " . . . Comparing these specific allegations with the bill of complaint for divorce in Florida and the transcript of testimony taken at Miami, Florida, on March 4, 1955, this court concludes that although some acts of cruelty proven before the Master in Florida included specific acts common to the New York counterclaim for separation, additional and separate acts of cruelty were alleged and proven in Florida to the satisfaction of the Master in Florida. The Florida bill of complaint charged Minnie A. Macaluso with neglect, calling the homes of Mr. Macaluso's customers, charged her with interfering with his business, interrogating women customers, calling him vile and obscene names, stamping on his mother's grave and attacking him with a knife on July 15, 1952. In Florida, the testimony of Joseph N. Macaluso was corroborated by one Helen Di Pasquale, a former resident of Buffalo, New York, who had moved to Florida. She testified that at a time after Joseph N. Macaluso had separated from his wife, Minnie A. Macaluso would call him at the Di Pasquale home at Randolph, New York, and threaten to kill him if she saw him. This witness testified that she had seen Minnie A. Macaluso go into tantrums 'many times' in arguing with her husband."

2. The Florida court had jurisdiction over the parties and the subject matter, sub judice.

a. **Respondent Ira Katz is a bona fide resident of Florida.** The Florida courts have adjudicated that Mr. Katz is a resident of Florida[5] (R 65, PA 2), and Mrs. Katz has abandoned any contention to the contrary. **Davis v. Davis**, 305 U.S. 32, 83 L. Ed. 26, 59 S.Ct. 3, 118 ALR 1518.

b. **Rose Katz personally appeared in the Florida forum.** Petitioner-Wife not only answered the complaint but vigorously urged her right to affirmative relief (R 12-14).

c. **Petitioner Rose Katz sought and received affirmative relief in the Florida proceedings.**[6] Petitioner was awarded $166,500 lump sum alimony which was secured and would become a charge against the estate of respondent should Ira Katz predecease her (R 40). Pursuant to court order Ira Katz paid in excess of $18,000 for petitioner's attorneys' fees and court costs.

3. **There is no question of compliance with the essential requirements of procedural due process.** In **Sherrer v. Sherrer**, 334 U.S. 346, 348, 92 L. Ed. 1431, 1434, 68 S.Ct. 1087, 1 ALR 2d 1355, this Court stated:

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[5] "Katz v. Katz, (Fla. App. 3rd 1964), 180 So. 2d 643, R 65 PA 21.

"No error is found in the Chancellor's finding that the husband was a resident of Florida . . . .

[6] See Helman v. Helman 73 N.Y.S. 2d 32 (1947), more fully discussed at page 21, *infra*.

[7] *Cf.* Estin v. Estin, 334 U.S. 541, 92 L. Ed. 1561, 68 S. Ct. 1213, 1 ALR 2d 1412, and Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L. Ed. 2d 1456, 77 S. Ct. 1360 (1957), upholding the "divisible divorce" concept where there is no personal appearance of the wife in the divorcing forum.

"At the outset, it should be observed that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process. We do not understand respondent to urge the contrary. The respondent personally appeared in the Florida proceedings. Through his attorney he filed pleadings denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. Chicago L. Ins. Co. v. Cherry, 244 US 25, 61 L ed 966, 37 S Ct 492 (1917); Baldwin v. Iowa State Traveling Men's Asso., 283 US 522, 75 L ed 1244, 51 S Ct 517 (1931)."

In the companion case to **Sherrer, supra, Coe v. Coe,** 334 U.S. 378, 92 L. Ed. 1451, 68 S. Ct. 1094, 1 ALR 2d 1376, this Court held:

"Nor has it been suggested that the proceedings before the Nevada court were in any degree violative of the requirements of procedural

due process or that respondent was denied a full opportunity to contest the issue of petitioner's Nevada domicile.

4. The Florida courts correctly held that the law as set forth in Berman v. Berman (Fla. 1958) 103 So. 2d 611, is controlling. (RA 9-18).

In affirming the Chancellor below the District Court of Appeal of Florida, Third District, stated (R 64-66, PA 3-4):

> "[6] At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, (Fla. 1958) 103 So. 2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra. In this cause, the wife filed a complaint for separation; the husband answered and filed a counterclaim seeking a separation, urging extreme cruelty. Thereafter, it can be reasonably inferred from the record [because of activities of counsel for the wife] that the husband sought a settlement of their domestic litigation, which was accomplished, and the wife filed an amended complaint. The husband withdrew his original

counterclaim, filed an answer to the amended complaint, and the New York judge entered a decree of separate maintenance providing for weekly payments to the wife totaling $18,000.00 a year, which payments the wife accepted at all times. This decree was entered upon proofs. [7] The only apparent difference between the Berman v. Berman case, supra, and the instant case is that one was submitted on affidavits and the other on proofs. In the Berman v. Berman case, supra, the Supreme Court held that the actions in New York were not res adjudicata as to the action in Florida by the husband. In the instant case, it appears that the decision in Berman v. Berman, supra, should control and that the husband's action for divorce in Florida should not be barred by the previous New York litigation . . . "

Mrs. Katz, like Mrs. Berman, obtained a separation from bed and board in New York on the ground of abandonment (after first obtaining temporary alimony on ex parte affidavits). Mr. Katz, like Mr. Berman, counterclaimed and then withdrew his defenses and counterclaim, did not appear at the trial and consented to the entry of a judgment ($18,000 for her support and maintenance).

It appears that Mrs. Berman actually testified at the trial, while it appears that Mrs. Katz appeared only by counsel.

Mr. Katz, like Mr. Berman, then filed suit in Dade County, Florida, alleging extreme cruelty. Mrs. Katz,

like Mrs. Berman, pled **res judicata** and estoppel by judgment. The Florida Supreme Court, in **Berman v. Berman,**[1] and in a long line of cases, unequivocally answered these issues:

> [1] In these circumstances it cannot be said that the "points and questions" presented in the instant suit for divorce were "actually litigated and decided" in the New York proceeding. Gordon v. Gordon, supra. The fact that the ex parte affidavits of the parties, containing among others, their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, were considered by a trial judge as a predicate for his award of temporary support to the wife is immaterial here, since it affirmatively appears that there was no actual trial of these charges nor any adjudication thereof. Moreover, in order to sustain a charge of "cruel and inhuman treatment" under § 1161 of the New York statute as a ground for separation from bed and board, there must be proof of either actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence. See Marino v. Marino, Sup. 1955, 145 N.Y.S.2d 571, and authorities cited. No cases need be cited in support of the proposition that this is a far greater degree of proof than is required to support a charge of "extreme cruelty" or "ungovernable temper" under the Florida divorce statute. § 65.04, Fla.Stat.1957, F.S.A.

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[1] (Fla. S. Ct. 1958) 103 So.2d 611 (RA 9).

It is true that the trial judge stated in his opinion filed in the New York proceedings (but not in the judgment of separation itself) that the husband abandoned the wife "without provocation" on her part. But the New York statute, § 1161, supra, states as a ground for separation "the abandonment of the plaintiff by the defendant", **not** "the abandonment of the plaintiff by the defendant without provocation." Apparently, the wife's misconduct is a defense that must be pleaded and proved by the husband under § 1163, supra, and it affirmatively appears from the record here that the husband withdrew his defense to the wife's action and that no evidence was adduced **at the trial** as to the wife's misconduct. Thus, the only "point in question" actually litigated and decided at the trial was that the husband abandoned the wife. Even if it be assumed arguendo that § 1161, supra, should be interpreted to mean "abandonment without provocation" as a ground for separation judgment, the question is concluded by the decision of this court in Horn v. Horn, Fla.1956, 85 So.2d 860, 861. There, a New York judgment of separation from bed and board in favor of the husband on the ground of abandonment was pleaded as a defense to the wife's suit for divorce in Florida on the grounds of extreme cruelty and habitual intemperance. In holding that the wife's suit was not barred, this court said that "where one spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce pro-

ceedings by the other spouse on grounds of of alleged habitual intemperance or extreme cruelty since the actions are entirely different.

In **Horn v. Horn**[9] the Florida Supreme Court held that a New York decree granted to the husband on the ground of abandonment did not bar the wife's action in Florida for divorce on the ground of her husband's habitual intemperance:

> "The primary question is whether or not the New York decree granting the husband a divorce from bed and board on the ground of abandonment bars the wife's action for divorce in Dade County on the ground of habitual intemperance.
>
> In our view the question requires a negative answer on authority of Gordon v. Gordon, Fla. 1952, 59 So. 2d 40; Coleman v. Coleman, 157 Fla. 515, 26 So. 2d 445, and Roy v. Roy, Fla. 1954, 73 So. 2d 294. These cases approve the doctrine that where on spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce proceedings by the other spouse on grounds of alleged habitual intemperance or extreme cruelty since the actions are entirely different."

In **Roy v. Roy**[10] a Washington, D. C. separation decree was entered in favor of the wife. The husband

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[9] (Fla. S. Ct. 1956) 85 So. 2d 860.

[10] (Fla. S. Ct. 1954) 73 So. 2d 294, *cert. den.* 348 U.S. 8, 3, 99 L. Ed. 687.

brought suit for divorce on the ground of habitual intemperance together with extreme cruelty and desertion. In upholding the Chancellor's decree of divorce to the husband, the Supreme Court of Florida held:

> "The causes of action were entirely different. In the Washington, D. C. suit the appellant merely alleged desertion and cruelty as a ground for separate maintenance. In the Florida suit for divorce the appellee alleged habitual intemperance was not an issue in the Washington, D. C. suit and it was an issue in the Florida suit, and the evidence was more than sufficient to sustain the Chancellor in finding that the appellant had been guilty of habitual intemperance."

See also **Shirley v. Shirley,** (Fla. App. 1958) 100 So. 2d 450; **Coleman v. Coleman,** (1946) 157 Fla. 515, 26 So. 2d 445; **Bernstein v. Bernstein** (1948), 160 Fla. 654, 36 So. 2d 190; and **Roseman v. Roseman** (1945), 155 Fla. 750, 21 So. 2d 215.

5. Florida courts are not required to give more weight to the New York separation than are New York courts.

It is apodictic that a "judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the state where rendered." **New York v. Halvey,** 330 US 610, 614, 91 L. Ed. 1133, 1136, 83 S.Ct. 275 (1947).

In **Lynn v. Lynn,**[11] a New York Court of Appeals

[11] 302 N.Y. 193, 97 N.E. 2d 748, 28 ALR 2d 1335, (1951)

was confronted with a factual situation similar to the case at bar. This Court denied certiorari on 15 October 1951, 342 US 849, 96 L. Ed. 640, 72 S.Ct. 72. The wife had been granted a New York separation decree on the basis that her husband had abandoned her without justification. Fifteen months later husband filed suit in Nevada. The wife personally appeared, challenging domicile and defending on the merits. The Nevada court granted a divorce to the husband on the grounds of acts of extreme cruelty committed by the wife subsequent to the New York decree, and adjudicated that the husband's Nevada residence was **bona fide.** The Nevada decree made no provision for alimony and recited that the wife had made no claim therefor. The husband returned to New York and continued support payments. The wife then sought an increase in alimony in the New York proceedings. The husband defended on the basis of the Nevada decree. The New York Court of Special Term denied the wife's motion, holding that the Nevada divorce decree terminated the husband's obligation. The New York Appellate Division reversed upon the ground, **inter alia,** that New York was not required to give full faith and credit to the Nevada because Nevada had not given full faith and credit to New York. In reversing the Appellate Division, the Court of Appeals held:

> ****And even if we were to accept the view of the Appellate Division that the Nevada court, in decreeing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the courts of this state would still be required to accord full faith and credit to the Nevada decree. Nevada's asserted denial of full faith does not justify or permit retaliation

by any other state. As the decisions make plain, plaintiff's only remedy to correct the alleged error was by direct appeal from the Nevada judgment through the Nevada courts and, if necessary, to the Supreme Court of the United States. See Morris v. Jones, 329 US 545, 552, 67 S Ct 451, 91 L Ed 488; Treinies v. Sunshine Mining Co. 308 US 66, 77, 60 S Ct 44, 84 L Ed 85; Roche v. McDonald, 275 US 449, 455, 48 S Ct 143, 72 L Ed 365; Fauntleroy v. Lum, 210 US 230, 237, 28 S Ct 641, 52 L Ed 1039; see also, Estin v. Estin, supra. 296 NY 308, 312, 73 NE2d 113, 114, affirmed 334 US 541, 68 S Ct 1213, Restatement, Judgements, §42, Comment a. p 165.

* * * *

****In the Estin case, Chief Judge Loughran, writing for a unanimous court, analyzed the law on the subject in this way, 296 NY at pages 312-313, 73 NE2d at page 115: "A divorce decree (whether foreign or domestic) granted by a court having jurisdiction of the persons of both parties may very well be held to override any incongruous alimony provision of an earlier domestic judgment of separation. See Scheinwald v. Scheinwald, 231 App Div 757, 246 NYS 33; Richards v. Richards, 87 Misc 134, 149 NYS 1028, affirmed 167 App Div 922, 152 NYS 1140; Holmes v. Holmes, 81 US App DC 132, 155 F2d 737, 166 ALR 1000. But the **res judicata** principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted

the last judgment was without jurisdiction of the person of the defendant. Cf. Miller v. Miller, 200 Iowa 1193, 206 NW 262; Wagster v. Wagster, 193 Ark 902, 103 SW2d 638; 2 Freeman on Judgments, 5th Ed. § 629.

* * * *
* * * *

That we reach a result in the case before us different from that in Estin v. Estin and Kreiger v. Kreiger merely because of the added circumstance that Mrs. Lynn chose to appear and participate in the proceedings in Nevada, may seem to some inequitable. The explanation, though, is clear and decisive. The additional factor present in this case operated to give the Nevada court jurisdiction of the wife's person and, by that token, vested that tribunal with power to adjudicate the wife's right of support as well as the parties' marital status. That being so, our conclusion is here compelled by the command of the full faith and credit clause, for, as the Supreme Court has recently declared, Sherrer v. Sherrer, supra. 334 US 343; 355, 68 S Ct 1087, 1093, "If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.' Williams v. North Carolina, 1942, 317 US 287, 302, 63 S Ct 207, 215 [87 L Ed 279]."

In 1953 a New York court in **Macaluso v. Macaluso**

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[2]207 N.Y. S 2d 105 (1960)

granted a wife a separation decree and permanent alimony and dismissed the husband's counterclaim on the merits. In 1955 a Florida court granted the husband a divorce on the ground of extreme cruelty predicated upon constructive service on the wife who never appeared in Florida. In a subsequent New York partition suit between the parties involving property rights, the Court, in considering the validity of the Florida divorce decree, stated:

> 1. The Florida divorce was legally entered in accordance with the statutes provided in the State of Florida.
>
> [1] 2. That under Article IV, Section 1, of the United States Constitution, the State of New York must give full faith and credit to the public acts, records and judicial proceedings of the State of Florida insofar as the Florida decree severs the marital status of the parties. However, said Florida decree did not alter or vary the requirements of the New York separation decree requiring Joseph N. Macaluso to pay alimony to his wife. See Estin v. Estin, 296 N.Y. 308, 73 N.E.2d 113, certiorari denied 332 U.S. 760, 68 S.Ct. 62, 92 L.Ed. 346. Lynn v. Lynn, 275 App.Div. 269, 88 N.Y.S.2d 791, reversed 302 N.Y. 193, 97 N.E.2d 748, certiorari denied 342 U.S. 849, 72 S.Ct. 72, 96 L.Ed. 640; Vanderbilt v. Vanderbilt, 207 Misc. 291, 138 N.Y.S.2d 222, affirmed 1 N.Y.2d 342, 153 N.Y.S.2d 1, certiorari granted 352 U.S. 820, 77 S.Ct. 67, 1 L.Ed.2d 45, affirmed 354 U.S. 416, S.Ct. 1360, 1 L.Ed.2d 1456.

3. * * * *

4. The New York decree of separation is not res judicata on the question of plaintiff's alleged cruel and inhuman treatment of her husband. As indicated above, the husband's counterclaim for legal separation, based on the cruelty of his wife, was dismissed on the merits by Justice Williams (a large portion of the **Macaluso** opinion appears at page 8 **supra**).

In **Helman v. Helman**[13], in a contested trial, a New York court in May of 1946 granted the wife a separation and support and maintenance of $35.00 per week. In January of 1947, the husband filed suit for divorce in Nevada and the wife answered and cross-claimed. The Nevada court granted the wife's divorce and $15.00 per week alimony and $25.00 per week child support. When the husband reduced payments to $20.00 per week, the wife sought arrearages due under the New York decree and a declaration that the New York decree is superior to Nevada with respect to the payment of alimony. The New York court, in recognizing the superiority of the Nevada decree in all respects over the prior New York separation decree, distinguished that case from Estin[14], stating:

****The Court said, at page 312 of 296 N.Y., at page 115 of 73 N.E. 2d: "A divorce decree (whether foreign or domestic) granted by a

[13]73 N. Y. S. 2d 32 (1947)

[14]Estin v. Estin, 296 N.Y. 312, 73 N.E. 2d 115, *cert. granted* 334 US 541, 92 L.Ed. 1561, 68 S.Ct. 1213, 1 ALR 2d 1412.

court **having jurisdiction of the persons of both parties** may very well be held to override any incongrous alimony provision of an earlier domestic judgment of separation (citing cases). But the **res judicata** principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted the last judgment **was without jurisdiction of the person of the defendant.**" (Emphasis supplied by the Court.)

* * * *

[2] In the instant case, however, the factor found missing in the Estin case is present. Here, although the wife obtained a judgment of separation in New York, she subjected herself thereaffter to the jurisdiction of the Nevada court. In fact, she did more; she counterclaimed and obtained an affirmative decree which stated that she recognized its superiority to the New York decree. The Nevada court thus had jurisdiction over both the plaintiff and the defendant, and its decree finally determined the issue with respect to alimony. That decree therefore vitated the prior New York judgment of separation. To paraphrase the language of the Court of Appeals in the Estin case, supra, as between two conflicting adjudications, the last must control, where jurisdiction was obtained over both of the parties.

CONCLUSION

There is an abysmal failure by petitioner to establish any basis for certiorari jurisdiction. The acts of cruelty of the petitioner which occurred after the entry of the New York separation decree makes moot all subsequent argument concerning legal niceties contained in the petitioner's argument of **res judicata** and the full faith and credit clause. Moreover, even in the absence of subsequent acts of cruelty by the wife, where the wife appeared before the Florida court and sought and obtained affirmative relief, the courts of New York have left no doubt that the most recent decree is superior and supersedes the prior New York decree. For the reasons and upon the authorities cited herein, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated 14 October 1964.

Respectfully submitted,

PAUL A. LOUIS

MILTON FERRELL
Counsel for Respondent

BERTHA CLAIRE LEE
of Counsel

Respondent's Appendix

APPENDIX

EXCERPTS OF THE DEPOSITION OF ROSE KATZ TAKEN IN NEW YORK ON 23 AUGUST 1962.

(R 69)

Q You wanted to take him back still?

A No, I didn't want to take him back. I wanted to get back to New York.

• • •

Q It is rather obvious that you and Ira are never going to get together again, is it not?

A That's why I tried to keep it clean and decent. Even in death there is decency.

• • •

EXCERPTS FROM THE TESTIMONY OF ROSE KATZ TAKEN BEFORE JUDGE HAL P. DEKLE AT MIAMI, FLORIDA, ON 3 JANUARY 1963.

(R 70)

"MR. HUMKEY: The question initially was this: 'Is there any chance of this marriage surviving?'

"THE WITNESS: Now? As far as I am concerned, no." Did you say that?

A Yes, I did.

• • •

(R 70)

I called Sarah up, and he said to me, "Is it not true that you brought this other woman to—" and I will not

say what—"You told Sarah because you could no longer function as a woman," in my deposition.

Q What I asked you—

A And I called up, and I said, "Sarah, you do plenty of crooked things. I can't even believe that even you would have said that for money," so she said—

Q I asked you when.

A The day after I gave my deposition.

Q What date, approximately?

A What date was the deposition?

Q August 23, 1962. You called her August 24th?

A I called her August 24th, and those were the exact words, and I hung up.

• • •

(R 71)

Q Now, Mrs. Katz, I believe you stated that last week you went into the apartment of Mr. Katz which he had had under lease for a number of years in New York.

A Yes, sir.

Q How did you obtain entrance into that apartment?

A Mr. Rand, who is in charge of the building, took me in.

• • •

Q You told him you were connected with Mr. Katz?

A I was connected with Mr. Katz, and is it possible for him to take me into the apartment, and he did.

Q You have answered my question. Did you go through his things in his apartment?

A I went through the closet. I looked in the drawers. I saw the telephone, its number. I saw—You mean through—Exactly what do you mean?

Q You opened the drawers?

A I opened the top two drawers of his dresser.

Q You opened the top two drawers?

THE COURT: Talk up a little for me.

THE WITNESS: Yes.

Q (By Mr. Ferrell) You opened up his top two drawers?

A I wanted to see if his underwear and things were there.

* * *

EXCERPTS FROM THE TESTIMONY OF SARAH KESSNER, A WITNESS ON BEHALF OF PLAINTIFF AND COUNTER-DEFENDANT

(R 72)

Q (By Mr. Ferrell) Will you please state your name for the record?

A Sarah Kessner.

* * *

Q What is your occupation?

A I am bookkeeper and secretary with Ira G. Katz, Inc.

Q How long have you been so employed?

A 26 years.

(R 73)

Q How old were you when you went to work with Ira G. Katz, Inc?

A Sixteen.

Q How long have you known the plaintiff, Ira G. Katz?

A Ever since I went to work there 25 years ago.

* * *

Q After the parties separated and ceased living together did Mrs. Katz continue to call you?

A Yes, she did.

Q What did she say to you, if anything, about how you should handle your affairs?

A Well, she felt—

Q Tell us what she said.

A She said that she had not been treated right by Mr. Katz, and that I should look out for myself; that Mr. Katz would take advantage of me and abuse me, and that I should see that the firm took care of me.

Q In that conversation did she use the words "take advantage" of you?

A Yes.

Q Well, tell the Court just how she expressed herself.

A Well, she felt—she used the word "screw"—that they would screw me.

Q What did you tell Mrs. Katz, if anything, in response to that statement she made.

A I told her that I felt that Mr. Katz took very good care of all of us; that he had never done that to anybody that had been associated with him and that I felt very happy and content.

Q When did that occur?

A That occurred many times; it wasn't just one conversation. She would repeat herself on the same sub-

(R 74)

ject many times. It occurred while Mr. Katz was living with her and it occurred while they were separated and after that.

* * *

Q You stated earlier that the parties ceased living together in 1954. Did Mrs. Katz ever telephone you after they separated?

A Yes, she did.

Q And on those occasions what did she say to you?

A It was the same conversation that went on before. She criticized Mr. Katz; she criticized him for not providing for her and she criticized his children.

Q Was she then getting $18,000 a year from him?
A Yes.

Q You mentioned a conversation earlier in which she called you and stated that you had better watch and see that he didn't screw you like he did her. Did she have any such conversation with you as late as April, 1956?

A Yes. She said that very often, sir. She said, "Sarah, look out for yourself and don't let them do to you what they have done to me, and to be careful of them."

Q Did you have any conversation with Mrs. Katz about the parties to this cause discussing a reconciliation and settlement and going on a trip to Jamaica in 1955?

A Yes.

Q Did you have any conversation with her after Mrs. Katz returned to New York from the trip to Jamaica?

A Yes, I did. She called me.

Q Did she state to you that they had reconciled or had not reconciled?

A She said that they discussed the settlement and that she wasn't satisfied.

Q Did she say anything to you as to whether or not they had reconciled?

(R 75)

A There wasn't nothing about reconciling. It was just about a settlement.

Q Did she say anything about attempting to reconcile with her to put her in a worse position?

A Well, she said that Mr. Katz was probably look- to make some sort of a deal as far as the settlement was concerned.

Q She never told you that they had reconciled at any time in 1955?

A No, she did not.

• • •

Q Mrs. Kessner, after the final decree of separation entered in New York on April 30, 1958, did Mrs. Katz warn you at any time subsequent to that to watch out and not get screwed?

A Yes, she did.

Q In that conversation who was she referring to; who did she mention?

A She mentioned Mr. Katz and his children.

• • •

EXCERPTS FROM THE TESTIMONY OF BENJAMIN KESSNER, A WITNESS ON BEHALF OF PLAINTIFF AND CROSS-DEFENDANT.

(R 76)

Q (By Mr. Ferrell) Will you state your name?

A Benjamin Kessner.

• • •

Q Do you know the plaintiff, Ira G. Katz, and the defendant, Rose Katz.

A I do.

Q What type of work do you do?

A I am general manager of Ira G. Katz, Inc.

Q How long have you been working there?

A About 23 years.

. . .

Q Did Mrs. Katz ever telephone your home?

A Many times.

Q Did you answer the telephone on occasions?

A The last time she called—one time she called my wife was out, so I answered the telephone.

Q Did she ever discuss with you anything about Mr. Katz and his children?

A Yes, she did.

(R 77)

Q What did she say to you?

A Well, she more or less referred to the fact that I should make sure that I would be taken care of as far as my business was concerned, because Mr. Katz wasn't trustworthy and the children were not, and she discussed him in certain language which wasn't too nice.

Q Tell us what that language was.

A Shall I say the words?

Q Yes.

A She called him a fucking bastard; she said that all of his children were bastards and so on. She said, "You should take care of yourself insofar as your future in the business is concerned."

Q When did this conversation take place?

A This particular conversation took place in 1958. I don't know the exact month, but it must have been somewhere around August because I know we were moving our premises at that time.

* * *

Opinion of **Berman v. Berman** relied upon by the Florida Courts in affirming as it appears in the Southern Reporter (Fla. Supreme Ct. 1958) 103 So. 2d 611.

Milton B. BERMAN, Appellant,

v.

Felicia C. BERMAN, Appellee.

Supreme Court of Florida.

May 28, 1958.

Rehearing Denied July 1, 1958.

Divorce action. The Circuit Court for Dade County, Charles A. Carroll, J., dismissed the complaint, and plaintiff appealed. The Supreme Court, Roberts J., held that since husband had withdrawn his defense to wife's New

York suit for separation from bed and board and had abandoned his counterclaim for separation on ground of wife's cruel and inhuman treatment of him, and only "point in question" actually litigated and decided at trial in New York action was that husband had abandoned wife, New York judgment would not be bar to husband's subsequent Florida action for divorce on grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper; and held that it was immaterial that ex parte affidavits of parties, containing their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, had been considered by trial judge in New York action as a predicate for his award of temporary support to wife.

Decree reversed and cause remanded with directions.

Drew, J., dissented.

1. Divorce 383

Where husband had withdrawn his defense to wife's New York suit for separation from bed and board and had abandoned his counterclaim for separation on ground of wife's cruel and inhuman treatment of him, and only "point in question" actually litigated and decided at trial in New York action was that husband had abandoned wife, New York judgment would not be bar to husband's subsequent Florida action for divorce on grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper; and it was immaterial that ex parte affidavits of parties, containing their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, had been considered by trial judge in

New York action as a predicate for his award of temporary support to wife. Civil Practice Act N.Y. § 1661; F.S.A. § 65.04.

2. Divorce 130, 132

In husband's divorce action, evidence would sustain his allegations of extreme cruelty and habitual indulgence in a violent and ungovernable temper.

Seymour Silverman, Miami Beach, for appellant.

Salley & Roman, Miami, for appellee.

ROBERTS, Justice.

We here review on appeal a decree entered in a suit for divorce filed by the appellant husband against the appellee wife. Insofar as here pertinent, the facts are that the husband's complaint sought a divorce on the grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper and also prayed for modification of the support provisions ($125 per week) of a New York judgment of separation from bed and board entered in an action brought by the wife against the husband. The wife answered, denying the allegations of the complaint and pleading **res judicata** on the basis of the New York judgment. By counterclaim she also prayed that the court "give full faith and credit to the New York decree in all particulars, including the granting of permanent alimony to the defendant from the plaintiff in the amount of One Hundred Twenty Five ($125.00)

Dollars per week; and will direct the defendant to pay to the plaintiff forthwith all arrearages" under the New York judgment.

The Chancellor heard the evidence of the parties and entered the decree here reviewed. His decree dismissed the husband's complaint with prejudice on the ground of "estoppel by judgment" by virtue of the New York judgment, and on the additional ground "that the plaintiff failed to sustain the material allegations of his complaint by a preponderance of the evidence." The wife's counterclaim was denied "without prejudice".

On this appeal, the husband contends, among others, that the Chancellor erred in dismissing his suit on the ground of estoppel by judgment since this defense was neither pleaded nor proved, and that the Chancellor's finding as to the husbands' evidence, quoted above, was erroneous. The wife complains of the denial of her counter-claim.

The husband's contention as to the propriety of the Chancellor's ruling with respect to estoppel by judgment must be sustained. In Gordon v. Gordon, Fla.1952, 59 So.2d 40, 45, this court, speaking through Mr. Justice Hobson, said:

> "The test with reference to res adjudicata or estoppel by judgment is, and should be, whether the evidence in both cases is in essence the same albeit **under estoppel by judgment it must be determined that 'every point and question' presented in the second action was actually litigated and decided in the first."** (Emphasis added.)

Moreover, it was noted in that case that the rule has an "extension or modification" in that, even where the evidence in both cases is essentially the same, the defenses of res judicata and estoppel by judgment may not be appropriate if the degree of proof necessary to entitle a litigant to the relief sought in the former action is greater than the degree of proof required to establish the right to the relief sought in the subsequent action.

Here, the record contains copies of a portion—not all—of the New York proceedings, the authenticity of which is admitted by the husband. As shown therein, the wife predicated her New York suit for separation from bed and board on the statutory grounds of (1) cruel and inhuman treatment, (2) failure to provide for her maintenance and support, and (3) abandonment. § 1161, New York Civil Practice Act. The husband countered with an answer denying the allegations of her complaint, alleging various acts of misconduct on her part, and counterclaiming for a decree of separation in his favor on the ground of the wife's cruel and inhuman treatment of him. It might be noted that § 1163 of the New York Civil Practice Act provides that "The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff; and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment."

The wife then applied in the New York proceedings for temporary alimony, suit money and attorney's fee. On the basis of ex parte affidavits filed by each party, without argument, the trial judge awarded her $100 per week as temporary support and an attorney's fee. This order was dated September 10, 1954. A final hearing

was held on May 2, 1955, before another trial judge. At that hearing, the wife testified, in effect, only that the husband had left the marital domicile in July of 1954 and had not returned except to pick up his personal belongings. The wife identified and placed in evidence a letter from the husband to the wife, dated September 24, 1954, a letter from his attorneys of the same date, and an "agreement between the parties and a stipulation between the attorneys for the parties, dated November 2, 1954." None of these papers is in the record here. At the conclusion of the wife's testimony her attorney advised the court as follows: "At this time, your Honor, I do not further pursue evidence to substantiate the plaintiff's complaint because I have been informed by my adversary that the defendant does not intend to contest the action for separation, and we have agreed that the plaintiff will accept and the defendant will pay in a final decree $125.00 a week towards the maintenance of the plaintiff. That is all." The trial judge then said: "Judgement is directed in favor of the plaintiff for separation on the ground of abandonment. Alimony is fixed in the sum of $125.00 a week * * *."

[1] In these circumstances it cannot be said that the "points and questions" presented in the instant suit for divorce were "actually litigated and decided" in the New York proceeding. Gordon v. Gordon, supra. The fact that the ex parte affidavits of the parties, containing, among others, their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, were considered by a trial judge as a predicate for his award of temporary support to the wife is immaterial here, since it affirmatively appears that there was no actual trial of these charges nor any adjudication thereof.

Moreover, in order to sustain a charge of "cruel and inhuman treatment" under § 1161 of the New York statute as a ground for separation from bed and board, there must be proof of either actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence. See Marino v. Marino, Sup. 1955, 145 N.Y. S.2d 571, and authorities cited. No cases need be cited in support of the proposition that this is a far greater degree of proof than is required to support a charge of "extreme cruelty" or "ungovernable temper" under the Florida divorce statute. §65.04, Fla.Stat. 1957, F.S.A.

It is true that the trial judge stated in his opinion filed in the New York proceedings (but not in the judgment of separation itself) that the husband abandoned the wife "without provocation" on her part. But the New York statute, § 1161, supra, states as a ground for separation "the abandonment of the plaintiff by the defendant". **not** "the abandonment of the plaintiff by the defendant without provocation." Apparently, the wife's misconduct is a defense that must be pleaded and proved by the husband under § 1163, supra, and it affirmatively appears from the record here that the husband withdrew his defense to the wife's action and that no evidence was adduced **at the trial** as to the wife's misconduct. Thus, the only "point and question" actually litigated and decided at the trial was that the husband abandoned the wife. Even if it be assumed arguendo that § 1161, supra, should be interpreted to mean "abandonment without provocation" as a ground for a separation judgment, the question is concluded by the decision of this court in Horn v. Horn, Fla. 1956, 85 So.2d 860, 861. There, a New York judgment of separation from bed and board in favor

of the husband on the ground of abandonment was pleaded as a defense to the wife's suit for divorce in Florida on the grounds of extreme cruelty and habitual intemperance. In holding that the wife's suit was not barred, this court said that "where one spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce proceedings by the other spouse on grounds of alleged habitual intemperance or extreme cruelty since the actions are entirely different."

[2] We have also considered the question of whether the Chancellor erred in finding that the husband "failed to sustain the material allegations of his complaint by a preponderance of the evidence." As background, it might be noted that the parties lived together a little over three years after their marriage, which took place just ten days after the wife was divorced from her former husband. She has two sons by her former marriage and is drawing $4,000 per year for their support from their father. The husband has a daughter who was adopted during his former marriage prior to the death of his then wife.

No useful purpose would be served in relating the various accusations that each spouse made against the other. Suffice it to say that the parties gave conflicting versions of various physical altercations between them during their marriage; and the wife categorically denied, in answer to leading questions by her attorney, that she ever physically assaulted her husband except in her own defense, or that she cursed and berated him and called him obscene names, or that she nagged and harassed him for household money. She did not, however, explain or

deny other testimony of the husband in support of his charges of extreme cruelty and ungovernable temper on the part of the wife, such as calling the attorney of a client of her husband's and making disparaging remarks about the husband to his great embarrassment or becoming enraged if he differed with her opinion in any matter, or making disparaging remarks about him to his daughter. Some of the altercations testified to by the parties were witnessed by their housekeeper who (although perhaps not a completely unbiased witness) corroborated the husband's testimony.

There can be no doubt that the family life of the parties was replete with marital and familial discord almost from the beginning. This is quite clearly another situation in which the marriage must be characterized as a "hopeless failure", as in McGee v. McGee, 149 Fla. 31, 5 So.2d 49, in which this court said that "This couple can never sail the matrimonial sea, except in storm, tempest, fog and misery. They can only wound and never comfort one another."

An analysis of the evidence reveals that the wife's testimony contradicted that of the husband in some but not all material respects. It should also be noted that the wife's testimony was completely uncorroborated, while that of the husband was supported by the housekeeper. When divorced from the atmosphere of "estoppel by judgment," which seems to have pervaded the hearing below, it is our view that there was sufficient evidence to support a decree in the husband's favor; and it must therefore be held that the Chancellor erred in denying to the husband a divorce.

This conclusion makes it unnecessary to dispose of the other questions here argued by the parties.

For the reasons stated, the decree here reviewed is reversed and the cause remanded for further proceedings not inconsistent herewith, including specifically disposing of the question of whatever financial interest or benefits, if any, the wife may have in the premises.

It is so ordered.

TERRELL, C. J., and THOMAS and HOBSON, JJ., concur.

DREW, J., dissents.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 465

ROSE KATZ,
Petitioner,

vs.

IRA G. KATZ,
Respondent.

REPLY TO RESPONDENT'S BRIEF

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IN THE

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REPLY TO RESPONDENT'S BRIEF

We reply to respondent's brief in the order in which his asserted reasons for denying the Writ are set forth therein.

1. Petitioner's acts of cruelty which occurred subsequent to the New York separation decree make moot her contention of res adjudicata.

No acts of cruelty subsequent to the separation in 1954 were alleged in the complaint. This was practically a verbatim copy of the counterclaim originally filed and subsequently withdrawn in the New York proceedings.

Respondent charges that the petitioner had a conversation with the respondent's employee Kessner in August of 1958 and that in this conversation Katz was referred to in obscene language. The alleged conversations between the

petitioner and the employees of Ira G. Katz, Inc., could not possibly have constituted cruelty to Ira G. Katz and such acts are not alleged in the complaint.

Respondent also complains about the fact that petitioner entered the New York apartment of Mr. Katz in December of 1962. How this entry could have constituted extreme cruelty we cannot say.

In *Coleman* v. *Coleman,* 26 So.2d 445 (Fla. 1946), cited by respondent, the wife went to the store where the husband was employed and engaged in heated arguments with him. There is no comparison between the case at bar and the cited one.

In *Berman* v. *Berman,* 103 So.2d 611 (Fla. 1958), also cited by respondent, the Court did not say that the wife "never failed to call the clients of her husband" but mentioned the fact that in support of his charge of cruelty and ungovernable temper, the wife called the attorney of the husband and made disparaging remarks against him to his great embarrassment.

2. The Florida court had jurisdiction of the parties and the subject matter.

There is no contention about this point. It has nothing to do with the question as to the court's improper refusal to accord full faith and credit to the New York judgment.

3. There is no question of compliance with the essential requirements of procedural due process.

This question is not even lurking in the record.

4. The Florida courts correctly held that the law as set forth in *Berman* v. *Berman* is controlling.

This question is not properly presented on the record. The question is not whether the courts properly applied

the law in the Florida case of *Berman* v. *Berman*, but whether the Florida court gave proper recognition to the New York decree in *Katz* v. *Katz*.

This is dealt with under the fifth question.

5. Florida courts are not required to give more weight to the New York separation than are New York courts.

Cited under this heading is *Lynn* v. *Lynn*, 97 N.E.2d 748, 302 N.Y. 193, 28 A.L.R. 2d 1335 (1951); *Macaluso* v. *Macaluso*, 207 N.Y.S. 2d 105 (1960); and *Helman* v. *Helman*, 73 N.Y.S. 2d 32 (1947).

In *Lynn* v. *Lynn*, the question was whether the doctrine of divisible divorce applied in a case where the out of state divorce was granted to the husband ex parte is to be extended to a situation where the wife appeared in the divorce proceedings.

The petitioner-wife and the defendant-husband were separated by a decree of the New York Supreme Court upon finding that the defendant-husband had abandoned the wife without just cause or justification. The decree awarded the wife custody of the parties' child and granted her an allowance subject to modification.

Sometime later the husband filed suit in Nevada on grounds of extreme cruelty. The wife appeared in the action and disputed the claim as to a bona fide domicile and contested the case on the merits. The Court found that the husband was a bona fide resident and that the wife had been guilty of extreme cruelty *subsequent to the date of the New York separation decree*. A divorce was granted but made no provision for the support of the wife and child.

Thereafter the husband returned to New York and married another woman but continued to pay the $85.00

per week called for by the New York decree. He took the benefit of tax deductions in connection with Federal and State income taxes.

In June of 1948 after the above proceedings had taken place, the plaintiff-wife then applied for an increase in the alimony awarded in the New York separation decree contending that the husband's income had increased. The husband opposed on the ground that the Nevada decree had provided that plaintiff had no right to alimony.

The Court appears pretermitted the question of whether the Nevada decree failed to accord full faith and credit to the New York judgment saying (28 A.L.R. 2d 1342):

> "And even if we were to accept the view of the Appellate Division that the Nevada court, in decreeing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the courts of this state would still be required to accord full faith and credit to the Nevada decree. Nevada's asserted denial of full faith does not justify or permit retaliation by any other state. As the decisions make plain, plaintiff's only remedy to correct the alleged error was by direct appeal from the Nevada judgment through the Nevada courts and, if necessary, to the Supreme Court of the United States." . . .

Macaluso v. *Macaluso* is substantially different from the case at bar.

Here the wife in 1953 obtained a judgment of separation from the husband in the Supreme Court of New York. She was awarded permanent alimony. The husband's counterclaim for separation was dismissed on the merits.

In 1955 the husband obtained a Florida decree of divorce from the wife on the grounds of mental and physical cruelty.

In the cited case which was an action for alimony the Florida decree was assailed on the ground that the husband was and always had been a resident of New York. The defendant contended that the Florida decree was entitled to full faith and credit in New York.

In the course of its opinion the Supreme Court said "the New York decree of separation was not res judicata on the question of plaintiff's alleged cruel and inhuman treatment of her husband."

It is obvious from a reading of the case that the Florida decree was entered on constructive service from which it may fairly be inferred that the wife did not appear in the case.

From this the conclusion is apparent that the New York decree of separation was not set up in bar in the Florida suit. Therefore the statement above quoted is obiter.

However the Court said that while it was unable to refer to the notes of the testimony taken in the original separation proceeding that it concluded "that although some acts of cruelty proven before the Master in Florida included specific acts common to the New York counterclaim for separation, additional and separate acts of cruelty were alleged and proven in Florida to the satisfaction of the Master in Florida."

Evidently, these "additional and separate acts" were the only ones considered.

In *Helman* v. *Helman*, the wife instituted an action for separation against her husband in the Supreme Court of New York. He appeared and contested the issue. Judgment was granted in favor of the wife and she was awarded alimony and the custody of the child.

Later the husband went to Nevada where he commenced an action against the wife for divorce. She filed an answer and crossclaim seeking a divorce. The court awarded her a divorce, the custody of the child and alimony, and decreed that the payment of alimony awarded by the Supreme Court of New York was superseded.

The question presented by this petition was not presented in the case of *Helman* v. *Helman* and the case is of no value as an authority.

The complaint in the case at bar charged no acts of cruelty after the entry of the judgment of separation by the Supreme Court of New York in the prior proceedings.

The fact that one or two of the witnesses in the trial of the case may have testified to the incidents referred to in Respondent's brief does not constitute grounds for disregarding the effect of the New York judgment.

As to the particular language which is quoted on page 5 of Respondent's brief, Mrs. Katz has point blank denied using any such language and if the question as to her guilt were properly presented here (which it is not) we have no doubt of the fact that we could show that such was not the case.

The Ben Kessner referred to in Respondent's brief was a long time employee of Respondent and we believe that his length of service in the Respondent's behalf was only exceeded by his mendacity. Such incident had no place in the briefs here and certainly Mrs. Katz could not be charged with extreme cruelty to her husband because she said something about him to one of his employees.

Incidentally, the use of vile and obscene language is a charge which was made against the petitioner in the counterclaim in the New York proceedings. See para-

graphs 6a, 6b and 6d, R. 19, and paragraphs 7, 8, and 10, R. 2 and 3.

Under the applicable decisions of the Supreme Court of New York and the Court of Appeals cited in our petition, the determination by the New York court in the separation proceedings was determinative of Respondent's guilt up to the time of the judgment. The Florida court refused to give such faith and credit to this judgment as it was entitled to in New York. Therefore the prior judgment was denied the full faith and credit to which it was entitled under the Constitution.

The writ should issue and the decree should be quashed with directions to dismiss the complaint.

Respectfully submitted,

.....,

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I HEREBY CERTIFY that a copy of the foregoing Reply to Respondent's Brief was mailed to Milton M. Ferrell, 550 Brickell Avenue, Miami, Florida, and to Paul A. Louis and Bertha Claire Lee, Alfred I. DuPont Building, Miami, Florida, Attorneys for Respondent this ..... day of November, 1964.

.....,

THOMAS H. ANDERSON.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 465

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IRA G. KATZ,
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PETITION FOR REHEARING

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR REHEARING

In denying the petition for certiorari in this cause, the Court overlooked or failed to consider that a petition for certiorari has been granted by this Court in a case presently pending in said Court entitled "Lucy C. Simons, Petitioner, v. Miami Beach First National Bank, as Executor of the Estate of Sol Simons, Deceased, Respondent" in which case it appears that the petitioner was granted a separation a mensa by the Supreme Court of New York from Sol Simons who subsequently instituted a Florida suit for divorce against the petitioner therein. The Florida proceedings continued to a final decree on an order of publication allegedly sent to the wrong address. Thereafter Sol Simons died and the petitioner in this Court sought to set aside the divorce by

direct proceedings in the Florida Courts in which effort she was unsuccessful.

It is stated in the petition for certiorari in the Simons case that among the reasons for granting the writ is that the courts of Florida have refused to give full faith and credit to the prior decree of the State of New York in violation of Art. IV, § 1 of the United States Constitution.

The petitioner herein suggests that there is sufficient similarity between the two cases to justify this Court in reconsidering the petition for certiorari in the instant case.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that the decision of the Circuit Court of Dade County, Florida, denying full faith and credit to the petitioner be set aside.

Respectfully submitted,

.....

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